United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

74 1428
B
P 65

UNITED STATES COURT OF APPEALS
For the Second Circuit

- -x

UNITED STATES ex rel. WILLIAM CADOGAN, :

Relator-Appellant, : No. ~~T-3317~~ 74-1428

-against- :

J. EDWIN LaVALLEE, Superintendant of Clinton Correctional Facility, Dannemora, New York :

Respondent-Appellee. :

- -x

On Appeal from the United States District Court
for the Northern District of New York

BRIEF AND APPENDIX OF THE RELATOR-APPELLANT

W. A. Newcomb
ATTORNEY AT LAW
36 W. 44 St.
NEW YORK 36, N. Y.
MU 2 6165

PAGINATION AS IN ORIGINAL COPY

UNITED STATES COURT OF APPEALS
For the Second Circuit

- -x

UNITED STATES ex rel. WILLIAM CADOGAN, :

Relator-Appellant, : No. T-3317

-against- :

J. EDWIN LaVALLEE, Superintendant of Clinton Correctional Facility, Dannemora, New York, :

Respondent-Appellee.

- -x

BRIEF AND APPENDIX OF THE RELATOR-APPELLANT

PRELIMINARY STATEMENT

William Cadogan, a prisoner of the State of New York who is serving two concurrent sentences of fifteen to thirty years and one of six to ten years as a multiple felony offender (R. 46), appeals from the Memorandum-Decision and Order, dated March 4, 1974, of the Hon. Edmund Port, United States District Judge of the Northern District of New York, which denied and dismissed his petition brought pro se for a writ of habeas corpus (R. 2 et seq.), alleging among other things that his 1956 New York State criminal conviction, the predicate of his said sentences imposed pursuant to his 1963 New York State criminal conviction, was obtained in violation of his Constitutional rights. On March 14, 1974, Judge Port granted appellant's application for a Certificate of Probable Cause to appeal from his Decision and Order of March 4, 1974. Appellant has at all times in this matter proceeded in forma pauperis and although counsel has been assigned in this Court by its order of April 1, 1974, appellant did not have counsel before Judge Port.

INDEX

STATUTES CITED

CASES CITED

The APPENDIX consists of two pages of Relator-Appellant's Petition to the Court below (R. 2 & 6), the opinion of the Court below (R. 45-52), and the docket entries.

STATEMENT OF PROCEEDINGS

In its eight page memorandum-decision of March 4, 1974, the Court below stated that with respect to the first three claims of his petition, it was satisfied that appellant had exhausted his remedies. The said decision disposed of appellant's four claims seriatim, holding either that they could not be granted as a matter of law or that they were without merit. (R. 45-52.) The thrust of appellant's contentions was that, whereas his 1956 conviction had been obtained unconstitutionally, it could not be used as a predicate for increased sentences pursuant to his 1963 conviction.

Addressing himself to the Court below, appellant states in his petition that he "appeals to this Court under title 28 U.S.C. Section 1915, for the Court to permit him to proceed in forma pauperis; assign counsel; procure the records necessary for a hearing in this matter." (R. 2.) Counsel was not assigned and the Court held no hearing. The Court did procure the records necessary for its consideration and when finished with them, it returned them to the County Clerk of Queens County with the expression of its thanks. (R. 46-47.)

STATEMENT OF FACTS

The facts, being mainly procedural, are few and simple. Appellant is confined in the Clinton Correctional Facility, Dannemora, New York. (R. 15.) On June 7, 1956, he was sentenced to a term of

nine to ten years by the Queens County Court for the felonious possession of a narcotic drug. As that sentence was in excess of that permitted by law, he was resentenced on November 18, 1957 to a term of five to ten years. (R. 45-46.) His conviction was affirmed by the Appellate Division. People v. Cadogan, 12 A.D. 2d 647 (2d Dept. 1960).

After being convicted of three further narcotic offenses, appellant was sentenced on November 19, 1963, as a multiple offender, to concurrent terms of fifteen to thirty years and six to twenty years. Appellant has alleged that his 1956 predicate conviction is illegal on the grounds (1) that unconstitutionally seized evidence was introduced at his trial when such evidence should have been suppressed; (2) that further evidence was introduced against him in violation of the holding of the Supreme Court in Bruton v. United States, 391 U.S. 123 (1968): (3) that he was denied his right to appeal from his 1956 conviction; and (4) that his sentence in 1963 as a second felony offender denied him his constitutional rights. (R. 46 & 51-52.) As already noted, the Court dismissed appellant's petition in its entirety.

It must be noted that in his papers, appellant relied on Section 1943 of the Penal Law of 1909. (R. 6.) That law remained in effect until September 1, 1967. Penal Law, § 500.05. The pertinent part of the statute then in effect, i.e. Section 1943, is quoted as follows:

> "An objection that a previous conviction was unconstitutionally obtained may be raised at this time and the

court shall so inform the person accused. *** The failure of the person accused to challenge the previous conviction in the manner provided herein shall constitute a waiver on his part of any allegation of unconstitutionality unless good cause be shown for his failure to make timely challenge." See N. Y. Penal Law, 39 McKinney's Consolidated Laws 1967, Appendix, § 1943.

For reasons that do not appear, the Court below did not treat any question raised by the application of this statute to the appellant at the time of his 1963 conviction. Yet the Supreme Court had already decided that evidence seized in violation of the Fourth Amendment could not be used by a State to obtain a conviction. Mapp v. Ohio, 367 U.S. 643 (1961). This is not a question of the retroactive application of that decision, cf. Linkletter v. Walker, 381 U.S. 618 (1965), but of whether an unconstitutional conviction, to which Mapp v. Ohio, supra, does not apply so far as vacating it is concerned, may nevertheless be used prospectively insofar as it would serve to increase the length of appellant's sentence. But not only did appellant refer to the statute in his petition, he also made precisely this argument, although not in quite the same language. (R. 6.) It is not a point without merit, but it is one that the Court, for one reason or another, failed to treat. No mention of the statute or its application is made in the Court's opinion. Coupled with two other factors in the case, it is one that should require a reversal of the Court's decision of March 4, 1974 so that the matter may be remanded for further consideration. Those other two factors are (1) that counsel was not assigned and (2) that the records of the Queens County Court have been returned so that the essential facts concerning the application of Section 1943 to appellant's 1963

conviction are not before and cannot be brought before this Court.

DISCUSSION

WHEREAS APPELLANT REQUESTED THE ASSIGNMENT OF AN ATTORNEY FOR THE PURPOSE OF REPRESENTING HIM IN THE PROCEEDINGS BEFORE THE COURT BELOW, IT WAS NOT IN THE INTERESTS OF JUSTICE TO DENY HIS REQUEST WHERE HE HAD A MERITORIOUS POINT THAT AN ATTORNEY COULD HAVE PRESENTED MORE ARTICULATELY AND EFFECTIVELY.

Had the Court below granted appellant's request for counsel in the proceedings before it, it might well have made its own task easier. The Court, understandably, had these comments to make about petitioner's application: "The petition is less than a model of clarity" and "Again, the petition is not a model of clarity." (R. 50, fn. 6 & R. 52, fn. 9.) Having had to make his way through appellant's papers himself, counsel could hardly disagree. But that is all the more reason why counsel should have been assigned.

The language of the Criminal Justice Act, though not conclusive, is certainly of help. The statute, 18 U.S.C.A. § 3006A(g), provides that "[a]ny person *** seeking relief under section *** 2254 of title 28 *** may be furnished representation *** whenever *** the court determines that the interests of justice so require and such person is financially unable to obtain representation." The quoted language is discretionary rather than mandatory. But the focus of the language is on the question of "the interests of justice." And if a prisoner of the State of New York has suffered the infliction of a substantially increased prison sentence because of the prospective application of what was then known to be an unconstitutional conviction,

there is a question of the interests of justice that is far from frivolous. But on the point of such representation, the Court made no determination or finding one way or the other. And this is precisely where the rub comes in. The situation of the indigent, inarticulate prisoner presents the problem of a self-perpetuating, circular danger. Without counsel, the interests of justice may not be perceived even to the point of seeing that the interests of justice require counsel. Obviously, it were better to err on the side of the interests of justice, if error there must be, by providing counsel. But the Court did not make such determination any more than it treated the application of Penal Law, § 1943, under the circumstances that the case presented. Surely, the interests of both the Court and the prisoner are met in having justice done, or at least in not having an injustice done. To that end, the appointment of counsel could not have been in error.

Counsel before the Court of Appeals stands upon an incomplete record, being unable to study that which was returned to the Queens County Clerk because there was no counsel below. It would appear that the Court below did in fact treat appellant's "Claim Two" with great care. (See R. 47-49.) And upon the state of the record, counsel is not prepared to say that the holding of Harrington v. California, 395 U.S. 250 (1969), is not dispositive of that particular issue. Counsel below might well have found himself unable to take any substantially different view of the question. The Court does appear to have treated the issue thoroughly, citing the trial transcript no less than seven times as well as discussing no less than four decisions of the Supreme Court. (Id.)

As for Claim Three, it must also be said that it would appear (given the circumstance that there was no counsel below) that the Court did not dismiss it out of hand. (R. 49-51.) In a lengthy footnote, which the Court says does not involve factors that caused it to dismiss that claim, it none the less states that it was led "to the conclusion that this claim is nothing more than afterthought to justify his assertion that his 1956 conviction was not final and still in the appellate process so that the rule of Mapp might possibly apply to his case." (R. 51, fn. 8.) That may well be true. Counsel will not say that appellant's papers do not reflect a scatter-gun approach. Be that as it may, valid points may still remain. It may still be that Mapp v. Ohio, supra, forbade the use of a previous conviction, since then of the kind held to be unconstitutional, as an adjunct to increasing the length of sentence under a perfectly constitutional and valid conviction. Linkletter v. Walker, supra, is not to the contrary. And as previously discussed, the statute, Penal Law, § 1943, is also not to the contrary. In sum, it does not strain the imagination to contend that counsel could have presented these points more clearly, more cogently and more effectively. A question of injustice still remains because appellant, necessarily acting pro se, could not distinguish the weight, or even the validity, of one point from another.

The papers appellant has composed upon his own behalf are a self-sufficient demonstration of his need of counsel. It may be that appellant has read all of the cases he refers to, but there are two points as to that. First, their precise import eludes him

and, secondly, he has no idea of either the importance or even the convenience of attaching their citations to their names. (Fortunately, many of them are familiar enough.) He shows a lack of both general and legal education. Let the following suffice as an example of the fact. It is quoted from his Petition for Certificate of Probable Cause.

> "Petitioner make application to this court for a CERTIFICATE OF PROBABLE CAUSE, on the following grounds:
>
> "That this court failed to consider the issue cited by the Federal Courts whom had original jurisdiction of the instant petition. [What is this sentence supposed to mean?]"
>
> "That this court failed to follow, even, the direction of the CIRCUIT COURT JUDGE, HON. STERRY R. WATERMAN, whom stated:
>
> "I respectfully dissent. ***." (R. 55.)

Who is, of course, much more often incorrectly used in place of whom, rather than the other way around. But that is important only as an indication of the man's lack of general education, let alone his lack of legal education. When a man does not understand the difference between a direction and a dissent, that should be significant. It is no answer to petitioner's various claims to state that he "was not a novice in criminal matters ***." (R. 51, fn. 8.) Surely, the more trouble a defendant may have had in criminal matters, the greater is his need of counsel. The same could be said were appellant a well educated man who had experienced recurrent entanglements with the law for his clever and successive schemes of embezzlement and misappropriation. No layman, honest or not, can ever quite become the lawyer he would like to be, even to serve himself. Proper

waiver of counsel is certainly a recognized right. But the petitioner-appellant did not waive his right to counsel. On the contrary, he requested counsel and was denied. He was denied even though his need was more than apparent.

This Court, to whom the prisoner now appeals, has not been silent on the subject of an accused's right to counsel. It has said:

> "*** There is a strong public policy, most strikingly illustrated by the Criminal Justice Act, 18 U.S.C. §3006A, that an accused should be represented by counsel at all times, unless he has knowingly decided that he does not wish counsel. The district courts invite troublesome claims and questions whenever counsel is prematurely relieved or a hiatus is permitted. It matters not that the defendant is in jail serving a sentence." United States v. McIntyre, 396 F.2d 859, 861 (2d Cir. 1968), cert. denied 39 U.S. 1054.

As already noted, the Criminal Justice Act applies to persons proceeding under 28 U.S.C.A. § 2254. Appellant cited that statute, stating that his petition was made "pursuant to title 28 U.S.C. Sections 2254 - 1915 for federal habeas corpus proceeding: forma pauperis application." (R. 3; see also R. 32.) To say the least, granting the right to counsel on appeal, but not doing so in the district court where the record must be established, is and must remain somewhat of an anomoly. No less than would the Court presumably, counsel would benefit from having the record that was available in the proceedings below but was returned to the County Clerk of Queens County. What points might or might not emerge therefrom it is now impossible to say.

On the present record, the question must remain undecided

whether or not the State of New York failed to apply its own law as required by the then Penal Law, § 1943. Even if it did give him proper warning as to the question of waiver, the question of good cause as affecting his waiver would still arise under the statute. It cannot be presumed that appellant knew of the decision in Mapp v. Ohio, supra, on the day of his sentencing in 1963, or of how it affected the provisions of Section 1943. These questions could only be answered by the record not before the Court on this appeal. There is also the question of what counsel might have found in that record to present to the Court below which the Court did not find for itself. Petitioner-appellant did not request the Court below to act as his counsel. "As must generally be the case, the trial judge could not effectively discharge the roles of both judge and defense counsel." Carnley v. Cochran, 369 U.S. 506, 510 (1969). Petitioner was left to his own devices when "representation in the role of an advocate is required." Ellis v. United States, 356 U.S. 674, 675 (1958). That a court of review, when it has sole jurisdiction of the one remedy left to a petitioner, may not decide the issue all by itself of whether or not there are substantial state or federal constitutional questions raised by the record when the petitioner has not full opprotunity to pursue that remedy is surely the fundamental holding of Griffin v. Illinois 351 U.S. 12 (1956). Appellant did not have that opportunity before the Court below. He could not have it when he was denied counsel.

CONCLUSION

The decision of the Court below should be reversed and the

case remanded with directions to reconsider the case after the appointment of counsel.

Respectfully submitted,

W. A. NEWCOMB
Attorney for Appellant,
William Cadogan.

Dated: New York, New York
April 30, 1974

APPENDIX

that this petition demonstrates the Handicap Relator has been placed under, to this date Relator's condition is unchanged, his access to the Courts is hampered, his documents are still missing, his affidavits are missing his legal material are missing, his glasses for seeing to work are missing, and he appeals to this Court under title 28 U.S.C. section 1915, for the Court to permit him to proceed in forma pauperis, assign Counsel, procure the Records, necessary for a hearing on this matter. Relator Deposes and says that he is a poor person within the Meaning of the above stated Statute

Sworn before me this
18 day of Jan 1973
Henry J. Bruyn
Notary Public
Clinton Co. - State of N. Y.
Commission Expires March 30, 19 73

William Cadogan
Relator Prose

Relator Request that the Court inquire into the legality of the Detention and vindicate Relator's Constitutional Rights from further illegal detention. Prohibited by the 14th amendment to the United States Constitution. The violation Complained of is that the predicate Conviction which has been used to increase punishment is unconstitutionally defective.

Submitted as exhibits with this petition are the following:

(1) Notice of appeal to the Western District
(2) Petition for certificate of probable Cause.
(3) Motion for hearing on Resentence.

Relators Contentions

Relator had Contended in the federal Court, Western District that the three points set-forth by the Court was not Raised in the state Court but they were being raised as an alternative to Reversal of the 1956 Conviction as the Petition Requested under. (U.S. v. BRUTON) which was exhausted on a Coram Nobis proceeding. the theory used by petitioner, was that his alternative points, dealt only with "use" not "Reversal", thus Relator claimed that point one, would show that the evidence used in obtaining Relators Conviction in 1956, Violated the fourth Amendment, U.S. Const. (Mapp. v. Ohio). And that since (Mapp) was not held to be Retroactive, (Reversal), was not possible, but under section 1943, Penal law, New York State, which only deal with the (use) not the (Reversal) of a predicate Conviction it clearly states that if the Conviction has been unconstitutionally obtained it must not be used as a predicate. The District Court ordered Respondent to show cause on this point. Respondent did not oppose the contention.

Point Two, contended that the 1956, conviction should not be used as a predicate because, Relator, was Tried and Convicted in 1956, sentenced 1956. June 6, appealed timely within 30, days as poor person; appellate Court Refused permission to appeal until Relator had served his time in prison.

Point three, Contended that even though the Court Considered the (Bruton v. U.S.) violation harmless as to vacating the conviction nevertheless it should not be used (the prior conviction) as a predicate to increase punishment.

Relator appealed to the second Circuit:

" United States Court of Appeals
Second Circuit.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES ex rel. WILLIAM CADOGAN,

Relator-Petitioner,

-vs- 73-CV-196

EDWIN LaVALLEE, Superintendent of Clinton Correctional Facility, Dannemora, New York,

Respondent.

EDMUND PORT, Judge

Memorandum-Decision and Order

By Memorandum-Decision and Order dated April 17, 1973, I dismissed, without prejudice a petition for habeas corpus in the above captioned action on the grounds that exhaustion of state remedies was not shown. Petitioner has now submitted additional material alleging exhaustion,[1] which I will treat as a motion for reconsideration. The motion for reconsideration is granted and upon reconsideration the petition is again denied and dismissed for the reasons herein.

The petitioner was convicted, after a jury trial, in the Queens County Court of feloniously possessing a narcotic drug and sentenced on June 7, 1956 to a term of 9-10 years. On November 18, 1957, he was resentenced[2] to a new term of

---

1. I am satisfied that exhaustion has been demonstrated in connection with claims 1, 2, and 3 as hereinafter designated.

2. The original sentence of 9-10 years was in excess of that provided by law.

5-10 years. The Appellate Division affirmed. People v. Cadogan, 12 A.D.2d 647 (Case 70) (2d Dept. 1960).

Thereafter, petitioner was tried and convicted in the Queens County Supreme Court of three narcotics felony offenses and sentenced on November 19, 1963, as a multiple felony offender, to concurrent terms of 15-30 years, 15-30 years, and 6-20 years.

In this petition, the 1956 predicate conviction[3] is attacked on the grounds: (1) that unconstitutionally seized evidence was introduced on his trial and should have been suppressed; (2) that a Bruton[4] violation occurred upon his trial; (3) that he was denied his right to appeal from the 1956 conviction. Finally, the petitioner has submitted additional papers directly to this court under letter dated December 2, 1973; the claim raised therein will be designated as claim 4 and considered hereinafter.

This court has obtained the petitioner's trial transcript from his 1956 and 1963 convictions from the Queens County Clerk, John J. Durante. The Clerk has also supplied this court with various other papers documenting the petitioner's many collateral proceedings in the Queens County Supreme Court. This court expresses its appreciation to Clerk Durante for his consideration in supplying the petitioner's state court records;

3. And the resentence thereon.
4. Bruton v. United States, 391 U.S. 123 (1968)

the records are being returned directly by this court to the Queens County Clerk.

CLAIM ONE:

Insofar as the first claim is concerned, Mapp v. Ohio[5] is not retroactive. Linkletter v. Walker, 381 U.S. 618 (1965). Mapp applies only to those cases that were not final on the date of its decision, June 19, 1961. The Appellate Division affirmed petitioner's conviction on December 14, 1960 and no further direct action was sought. Petitioner's assertions that his conviction was not final are without merit, as is more fully discussed in connection with Claim 3 hereinafter.

Petitioner's first claim is, therefore, denied and dismissed.

CLAIM TWO:

Insofar as the Bruton claim is concerned, the rule of Bruton is retroactive. Roberts v. Russell, 392 U.S. 293 (1968).

The claimed Bruton violation occurred when Detective John Barry, a witness for the People, stated on direct examination:

> Then Detective Collins said to the defendant Hedges, 'Listen, Hedges, why is it that we find Rudolph Cadogan in your apartment mixing heroin in the kitchen and you at the same time are driving Rudolph Cadogan's car? How do you explain that?' And Hedges threw up his hands and he said, 'Well, you've got me in a vise, Collins. We're partners.' Trial Transcript, p. 91.

5. 367 U.S. 643 (1961).

The trial judge immediately gave the jury cautionary instructions that the statement could only be considered against Cadogan's co-defendant Hedges, and not against Cadogan. No objection to the statement was made by Cadogan's counsel. Indeed, on cross examination, Cadogan's counsel elicited essentially the same response purposely from Detective Barry. Trial Transcript at p.212. Counsel for Hedges, the co-defendant, also cross examined Barry regarding this comment. See, e.g. pp.190-98, Trial Transcript. The prosecution elicited essentially the same statement from Detective Joseph Dean on direct. Trial Transcript, p.250. Counsel for Cadogan's co-defendant also interrogated Dean regarding this remark on cross examination. See, e.g., Trial Transcript at pp.301-302. Also, Detective Donald Collins was questioned by the prosecutor regarding this remark on direct. Trial Transcript, p.478. Cadogan's counsel also elicited the remark from Detective Collins on cross examination. Trial Transcript at p. 505.

The Queens County Supreme Court has previously denied a coram nobis petition,without a hearing, raising this same claim. People v. Cadogan, Ind. No. 155-56 (June 9, 1969, Bosch,J.). That court found a technical Bruton violation present but held it to be harmless error in the circumstances of the case, citing Chapman v. California, 386 U.S. 18 (1967) and Harrington v. California, 395 U.S. 250 (1969). On appeal of that coram nobis determination, the Appellate Division, Second Department, unanimously affirmed stating:

> In our opinion the direct proof of defendant's guilt was so overwhelming that there was no reasonable possibility that the evidence complained of might have contributed to the conviction, hence, the Bruton error must be characterized as harmless. 34 A.D. 2d 959 (Case #18) (1970).

I agree with the determination of the state courts. Cadogan was convicted of criminal possession of a narcotic drug, and was apprehended by Detectives Barry and Dean in the act of mixing a white powder which was subsequently identified as heroin. The detectives testimony was corroborated by another prosecution witness, one Frances McKenny. Frances McKenny was arrested with Cadogan for the same offense but her case was severed for trial. She testified voluntarily on Cadogan's trial for the prosecution.

I am of the opinion that the evidence against the petitioner was so overwhelming that the jury would have convicted him in the absence of the complained of statement and that the error constituted harmless error under the facts and circumstances of this case. Harrington v. California, supra; Chapman v. California, supra. Therefore, this claim is likewise denied and dismissed.

CLAIM THREE:

Petitioner's third claim is that he was denied his right to appeal from his June 6, 1956 conviction and his subsequent resentence thereon on November 18, 1957. This claim is belied by an examination of the Appellate Division's

affirmance of December 14, 1960. People v. Cadogan, 12 A.D. 2d 647 (Case #70) (2d Dept. 1960).

The petitioner also, apparently,[6] attempts to make the claim that he was denied the right to appeal because he was not advised by the appellate court or appellate counsel of his right to petition the Court of Appeals for leave to appeal from the Appellate Division's affirmance of December 14, 1960; he claims he was on parole at this time.

Petitioner has not cited, and this court has not found any authority supporting the proposition that a defendant, in 1960, was constitutionally entitled to be advised by court or counsel of his right to petition the Court of Appeals for leave to appeal.[7] In the absence of such precedent or authority

6. The petition is less than a model of clarity.

7. The leading cases regarding appeal rights have dealt with a denial of an appeal from the conviction itself to the Appellate Division. See United States ex rel. Smith v. McMann, 417 F.2d 648 (2d Cir. 1969) (en banc) cert. denied 397 U.S. 925 (1970); United States ex rel Witt v. LaVallee, 424 F.2d 421 (2d Cir. 1970); United States ex rel Williams v. LaVallee, 487 F.2d 1006(2d Cir. 1973); People v. Montgomery, 24 N.Y.2d 130, 299 N.Y.S.2d 156 (1969).

this contention will be likewise denied and dismissed[8].

CLAIM FOUR:

Under date of December 2, 1973, the petitioner submitted additional papers directly to this court and requested that they be annexed to the pending petition and considered in connection therewith. The claim made is that his sentence as a second felony offender pursuant to § 1941(1) of the N.Y. Penal Law of 1909, on his 1963 conviction, denied him

8. Although this claim was not dismissed on account of the following factors, they shed considerable light on the credibility to be placed in petitioner's claim: (1) The petitioner was not a novice in criminal matters before his 1956 conviction; the various state court papers secured by this court reveal that the petitioner had three (3) previous narcotics related convictions previous to the 1956 conviction; two of the three previous convictions resulted in jail terms. (2) No mention of this claim is made in his multitudinous state court proceedings from 1956 to March 1971; on this latter date a claim resembling this assertion appeared in a petition for federal habeas corpus submitted to the Western District of New York, combined with the same Mapp violation contention as made herein as claim one. All of which leads this court to the conclusion that this claim is nothing more than an afterthought to justify his assertion that his 1956 conviction was not final and still in the appellate process so that the rule of Mapp might possibly apply to his case. (3) The petitioner himself, prior to 1960, filed, pro se, notices of appeal from denials of petitions for coram nobis by the Queens County Clerk and from the resentencing by the same court to the Appellate Division, leading to the conclusion that the petitioner was familiar with his appeal rights and how to perfect them. (4) No affidavit from appellate counsel has been submitted to this court regarding this point; (5) Petitioner alleges he was on parole when the time to file the petition for leave to appeal ran - it is reasonable to assume that petitioner's interest in further appellate proceedings was, therefore, considerably lessened by this factor; (6) Finally, it is interesting to note that the petitioner does not assert he was unfamiliar with his right to petition the Court of Appeals for leave to appeal, only that he was not so advised of that right by the Appellate Division or counsel.

his constitutional rights. The claim apparently made[9] is that the length of the sentence he received violated his constitutional rights.

It is not shown that this claim has been exhausted in the state courts; however, the claim is so clearly frivolous and without merit that it will also be denied and dismissed on its merits. Petitioner was convicted in 1963 under §1751 of the Penal Law of 1909; the sentence under §1751 for a first offense was 7 to 15 years. Clearly, petitioner's 1963 sentences were within the statutory limits prescribed by law in sections 1751 and 1941(1) of the Penal Law of 1909. Therefore, the claim raises no issue cognizable in a federal habeas corpus petition.

For the reasons herein, it is

ORDERED, that the petition herein be and the same hereby is denied and dismissed. Leave to proceed in forma pauperis is granted, and the Clerk is directed to file the papers herein without the payment of fees.

Edmund Port
United States District Judge

Dated: March 4, 1974.
Auburn, New York.

9. Again, the petition is not a model of clarity.

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date:

D. C. Form No. 106 Rev.

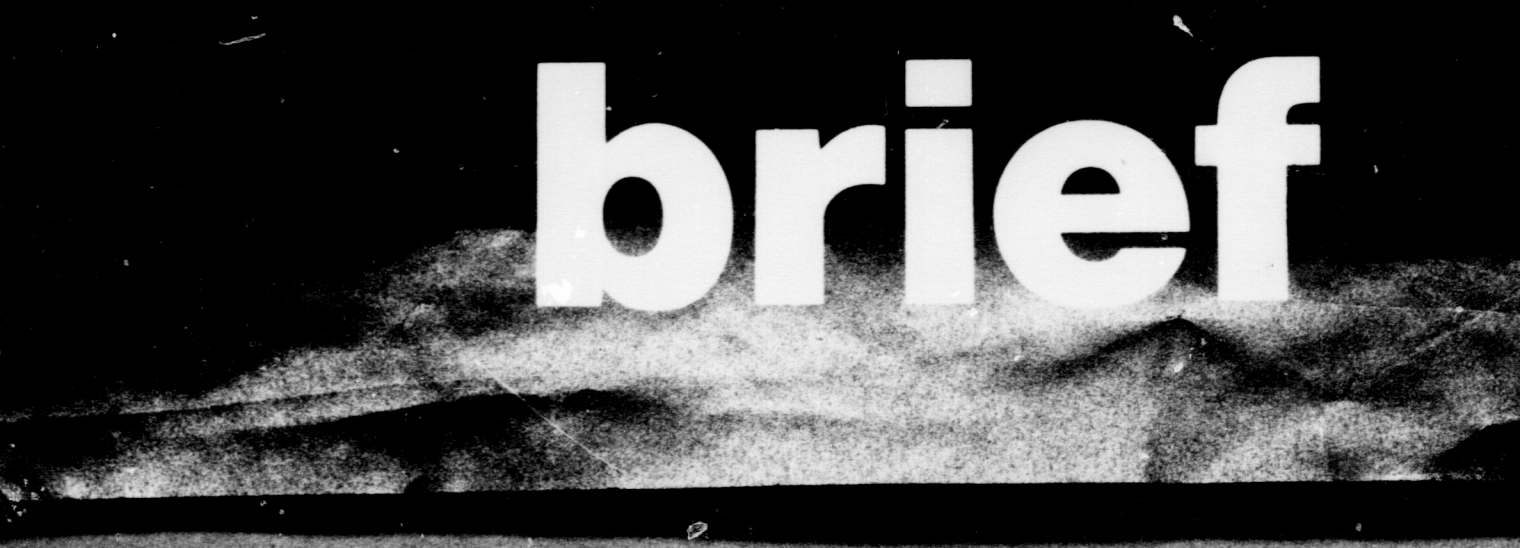
TITLE OF CASE	ATTORNEYS
UNITED STATES ex rel WILLIAM CADOGAN, Relator-Petitioner vs. EDWIN LaVALLEE, Superintendent of Clinton Correctional Facility, Dannemora, New York	For plaintiff: For defendant:

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.
J.S. 5 mailed	Clerk					
J.S. 6 mailed	Marshal					
Basis of Action: Petition for Writ of Habeas Corpus	Docket fee					
	Witness fees					
Action arose at:	Depositions					

74-CV- 196

William Cadogan vs. Edwin LaVallee, Supt. Clinton Corr. Facility

DATE	PROCEEDINGS	Date order or Judgment Noted
1973		
April 24	(1) Filed Petition for Writ of Habeas Corpus	
" 24	(2) " Memorandum-Decision and Order (4/17/73) denying and dismissing Petition without prejudice for failure to demonstrate exhaustion of available state cou remedies	
74 24	(3) Filed Judgment	
rch 5	(4) " motion for reconsideration	
" 5	(5) " Memorandum-Decision and Order (3/4/74) granting motion for reconsideratio and denying petition and dismissing again. Leave to proceed in forma pauperis granted and Clerk is directed to file papers without payment of fees-HON. E. PO	
" 15	(6) Filed application for Certificate of Probable Cause and order endorsed on cover granting same, leave to proceed in forma pauperis is denied as unnecessary. Application for assignment of counsel on appeal is denied. -SO ORDERED- HON. EDMUND PORT, USDJ	
" 21	(7) Filed Notice of Appeal - copies sent to Clerk, USCA and Atty Gen. State of NY, attention Joseph Castellani	


brief